NO. _____

Supreme Court, U.S.
FILED
061166 NOV 3 - 2006
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

IN RE ALLEN POWERSTEIN - PETITIONER

vs.

UNITED STATES OF AMERICA - RESPONDENT

ON PETITION FOR A WRIT OF MANDAMUS/PROHIBITION

{RULE 20(3) }

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE

PETITION FOR A WRIT OF MANDAMUS/PROHIBITION

{RULE 20(3) }

PREPARED BY:

ALLEN POWERSTEIN. PRO SE

P.O. BOX 1747

DUNNELLON. FLORIDA 34430-1747

(352) 489-8546 TELEPHONE/FACSIMILE

QUESTION(S) PRESENTED

I

WHETHER THE UNITED STATES DISTRICT COURT {"DC"} VIOLATED 26 USC 7212(a) AT SENTENCING ON MARCH 31, 1994 AND WHETHER A VIOLATION OF A FEDERAL STATUTE AT SENTENCING CAUSES THE DC TO RELINQUISH SUBJECT MATTER JURISDICTION, THAT IS NON-WAIVABLE, RESULTING IN A SENTENCE THAT IS NULL AND VOID THAT MUST RESULT IN POWERSTEIN BEING RESENTENCED, NOTWITHSTANDING THAT POWERSTEIN HAS COMPLETED HIS SENTENCE AND IS NO LONGER IN FEDERAL CUSTODY.

II

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT {"11TH CIR."} ACQUIRES JURISDICTION TO REVIEW AN ERROR OF LAW, e.g., A VIOLATION OF A FEDERAL STATUTE AT SENTENCING, UNDER THE ABUSE OF DISCRETION STANDARD AND WHETHER A DISTRICT COURT BY DEFINITION ABUSES ITS DISCRETION WHEN IT COMMITS AN ERROR OF LAW. SEE KOON v. UNITED STATES, 518 US 81, 116 S CT 2035, 2047, 135 L ED 2D 392 (1996) WHEREIN THE UNITED STATES SUPREME COURT HELD IN PART:

> ".....LITTLE TURNS, HOWEVER, ON WHETHER WE LABEL REVIEW OF THIS PARTICULAR QUESTION ABUSE OF DISCRETION OR DE NOVO, FOR AN ABUSE-OF-DISCRETION STANDARD DOES NOT MEAN A MISTAKE OF LAW IS BEYOND APPELLATE CORRECTION.
>
> COOTER & GELL, SUPRA, AT 402, 110 S CT AT 2459. A DISTRICT COURT BY DEFINITION ABUSES ITS DISCRETION WHEN IT MAKES AN ERROR OF LAW. 496 US AT 405, 110 S CT AT 2460." KOON, 116 S CT AT 2047.

III

WHETHER THE FILING OF A WRIT OF MANDAMUS/PROHIBITION {RULE 20(3)} CONVEYS JURISDICTION TO A FEDERAL COURT, KNOWING THAT JURISDICTION FROM THE WRIT IS LIMITED TO A REVIEW OF ERRORS OF THE MOST FUNDAMENTAL CHARACTER, e.g., A VIOLATION OF A FEDERAL STATUTE AT SENTENCING IS AN ERROR OF THE MOST FUNDAMENTAL CHARACTER AND USE OF THE WRIT MUST BE USED TO ACHIEVE JUSTICE. UNITED STATES v.

MAYER, 235 US 55, 69, 35 S CT 16, 59 L ED 129 (1914); UNITED STATES v. MORGAN, (FN 1) 346 US 502, 512, 74 S CT 247, 98 L ED 248 (1954). (FN 1) AS THE SUPREME COURT NOTED IN MORGAN, SUPRA (AN APPLICATION FOR A WRIT OF ERROR CORAM NOBIS IS OF THE SAME GENERAL CHARACTER AS [A MOTION] UNDER 28 USC 2255.) MORGAN, 346 US AT 506 n. 4.

IV

WHETHER THE FILING OF A WRIT OF MANDAMUS/PROHIBITION CONVEYS JURISDICTION TO A DC THAT HAS VIOLATED THE DOUBLE JEOPARDY CLAUSE {"DJC"} OF THE 5TH AMENDMENT TO THE CONSTITUTION THAT LIMITS JURISDICTION TO A REVIEW OF ERRORS OF THE MOST FUNDAMENTAL CHARACTER, e.g., A VIOLATION OF THE DJC IS CERTAINLY AN ERROR OF THE MOST FUNDAMENTAL CHARACTER AND THE FILING OF A WRIT WILL ALLOW A DC TO RECOGNIZE ITS EGREGIOUS ERROR AND ACHIEVE JUSTICE THAT IT HAS SWORN TO UPHOLD AT ALL COSTS.

V

WHETHER THE FILING OF A WRIT OF MANDAMUS/PROHIBITION CONVEYS JURISDICTION TO THE 11TH CIR., THE APPEALS COURT KNOWING OR OUGHT TO HAVE KNOWN THAT ITS DENIAL OF POWERSTEIN'S APPEAL(S) AND SUBSEQUENT DENIAL OF A PETITION FOR REHEARING (OR HEARING) EN BANC IN DOCKET NO. 05- 15144-DD, FROM WHICH POWERSTEIN SEEKS THE GRANTING BY THIS COURT OF A PETITION FOR A WRIT OF MANDAMUS/PROHIBITION {RULE 20 (3)} IS IN DIRECT CONFLICT WITH PRECEDENT SET BY THE 11TH CIR. IN UNITED STATES v. BUSHERT, 997 F2D 1343 (11 CIR 1993), CERT. DEN. 115 S CT 652 (1994), A CASE FROM WHICH POWERSTEIN IS CLEARLY INDISTINGUISHABLE AND WITH STRONG STRIKING SIMILARITIES.

VI

WHETHER THE FILING OF A WRIT OF MANDAMUS/PROHIBITION CONVEYS JURISDICTION TO A DC THAT HAS ADMITTED ON THE RECORD [DE 161 OF JULY 30, 2002] THAT IT HAS ERRED IN THIS CONVOLUTED PROCEEDING THAT NOW SPANS 12¾

YEARS AND NUMBERS TWENTY {20} VIOLATIONS, ERRORS OF LAW AND/OR ABUSES OF DISCRETION BY THE DC AT SENTENCING AND POST-SENTENCING, WHICH VIOLATIONS, ERRORS OF LAW AND ABUSES OF DISCRETION HAVE GONE UNDETECTED, UNNOTICED AND UNADDRESSED FROM SENTENCING ON MARCH 31, 1994 THROUGH THE DATE OF THIS FILING.

VII

WHETHER THE DC CREATED AN EGREGIOUS ANOMALY AND CONCOMITANTLY ABUSED ITS DISCRETION WHEN IT SENTENCED POWERSTEIN TO A TERM OF IMPRISONMENT OF 63-MONTHS, A SENTENCE THAT INCLUDES 60-MONTHS FOR OFFENSE OF CONVICTION 26 USC 7201 {"7201"} AND 3-MONTHS FOR OFFENSE OF CONVICTION 26 USC 7212(a) {"7212(a)"}, THE TRIAL COURT KNOWING OR OUGHT TO HAVE KNOWN THAT THE VAST MAJORITY {87%} OF THE TOTAL OFFENSE LEVEL OF 25 IS ATTRIBUTABLE TO 7212(a) THAT CARRIED A THREE {3} MONTH SENTENCE AND WITH 13% OF THE TOTAL OFFENSE LEVEL OF 25 ATTRIBUTABLE TO 7201 AND A SIXTY {60} MONTH SENTENCE, THE END RESULT IS AN EGREGIOUS ANOMALY THAT HAS GONE UNDETECTED, UNNOTICED AND UNADDRESSED SINCE SENTENCING ON MARCH 31, 1994 OR 12 ¾ YEARS.

VIII

WHETHER A DC CAN HOLD POWERSTEIN IN CONTEMPT OF COURT {APPENDIX "B"} FOR FILING PLEADINGS WITH THE COURT THAT SOUGHT TO BRING TO THE DC's ATTENTION ITS VIOLATIONS, ERRORS OF LAW AND/OR ABUSES OF DISCRETION THAT WILL WHEN HEARD, OVERTURN A CONVICTION AND CORRECT AN ILLEGAL SENTENCE THAT WILL ALLOW POWERSTEIN TO PURSUE A MAL-PRACTICE ACTION AGAINST HIS DISBARRED ATTORNEY WHO INITIALLY REPRESENTED POWERSTEIN ON A RETAINED BASIS AND LATER WAS COURT-APPOINTED BEFORE THE 11TH CIR. AND ANY OTHER RELIEF PERMITTED BY LAW.

IX.

WHETHER THE FILING OF A WRIT OF MANDAMUS/PROHIBITION CONVEYS JURISDICTION TO A

DC THAT HAS VIOLATED UNITED STATES SENTENCING GUIDELINES, e.g., 2T1.3/2T1.4 AT SENTENCING, A VIOLATION THAT CAUSES THE DC'S SENTENCE TO BE NULL AND VOID, THAT MUST RESULT IN THE HIGH COURT REVERSING, VACATING AND REMANDING FOR THE DC TO START ANEW.

X

WHETHER POWERSTEIN CAN OBTAIN THE RELIEF HE SEEKS IN ANY OTHER COURT ASIDE FROM THE SUPREME COURT OF THE UNITED STATES.

POWERSTEIN WOULD ARGUE THAT UNLESS THIS COURT INTERVENES IN THIS CONVOLUTED PROCEEDING THAT NOW SPAN 12 ¾ YEARS, THAT HE WILL NEVER ACHIEVE THE JUSTICE HE SEEKS AND DESERVES AS THE DISTRICT COURT THAT SENTENCED HIM REFUSES TO ACKNOWLEDGE THE ERRORS OF LAW, VIOLATIONS OF LAW AND ABUSES OF DISCRETION IT AS HAS COMMITED OVER THIS 12 ¾ YEAR TIME FRAME.

THE 11 TH CIRCUIT ON THE OTHER HAND IS UNABLE TO GRANT THE RELIEF SOUGHT AS IT REFUSES TO RECOGNIZE KOON v.UNITED STATES, 518 US 81, 116 S Ct 2035, 135 L Ed 2d 392 (1996); REFUSES TO RECOGNIZE THAT ITS DECISION IN THE INSTANT CASE CONFLICTS WITH PRECEDENCE SET BY THE 11NT CIRCUIT IN UNITED STATES v. BUSHERT, 997 F 2d 1343 {11 Cir 1893}, CERT. DEN. 115 S Ct 652 (1994) AND REFUSES TO ACKNOWLEDGE ***CORAM NOBIS*** RELIEF THAT POWERSTEIN HAS DEMONSTRATED HE IS ENTITLED TO AND IS SUPPORTED BY AN ABUNDANCE OF CASE LAW.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The following persons have an interest in the outcome of this case:

1. Devereaux, Mark B., AUSA, trial counsel for the United States;

2. Phipps, Tamra, AUSA, Chief-Appellate Division;

3. Powerstein; Allen, pro se, Defendant-Appellant;

4. Ronca, Peggy Morris, AUSA, Appellate Division;

5. Schlesinger, Harvey, E., Judge, United States District Court;

6. Perez, Paul I., United States Attorney

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.
[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition as follows:

STATEMENT OF DESIGNATION OF PARTIES

{1} Defendant-Appellant ALLEN POWERSTEIN will be referred to throughout this PETITION FOR A WRIT OF ERROR CORAM NOBIS as either of the following:

"My"
"Appellant"
"Powerstein"
"Defendant"
"I"

{2} Plaintiff-Appellee, the United States of America, will be referred to throughout this PETITION FOR A WRIT OF MANDAMUS/PROHIBITION as either of the following:

"Appellee"
"Government"
"United States"

{3} Record excerpts will appear as "RE Exhibit A";
Docket entries will appear as either "DE 282" or "Doc. 282";
Sentencing Transcript will appear as "ST of 3/31/94 at 28/6-9";
Plea Agreement Transcript will appear as "PT of 7/2/1993 at 26/17."

{4} The honorable Harvey E. Schlesinger, Judge, United States District Court will be referred to throughout this PETITION FOR A WRIT OF MANDAMUS/PROHIBITION as either of the following:

"Harvey E. Schlesinger, J., USDC;
"Schlesinger"

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STATEMENT WITH RESPECT TO APPENDICES

OTHER THAN APPENDICES A {THE FINAL JUDGMENT AND MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE 11TH CIRCUIT {"11TH CIR."}FILED AUGUST 14, 2006; THE EN BANC PER CURIAM OPINION OF THE 11TH CIR. FILED AUGUST 4, 2006; AND THE PER CURIAM OPINION OF THE 11TH CIR. FILED JUNE 19, 2006} AND B {UNITED STATES DISTRICT COURT ORDER FILED AUGUST 30, 2005}, ALL OTHER APPENDICES HAVE BEEN REFERRED TO BY NAME ONLY BUT HAVE NOT BEEN INCLUDED IN THIS PETITION FOR A WRIT OF MANDAMUS/PROHIBITION RULE 20(3) IN THE INTEREST OF TIME CONSTRAINTS AND PETITIONER'S DESIRE NOT TO BURDEN THIS COURT WITH A MULTIPLICITY OF APPENDICES THAT NUMBER MORE PAGES (46) THAN THE PETITION ITSELF (30).

PETITIONER, A PRO SE LITIGANT, IS OF THE OPINION THAT SHOULD THIS HONORABLE COURT NEED TO REFER TO OR READ ANY OTHER APPENDICE IT CAN REQUEST SAME FROM THE COURT FILE THAT IT HAS AT ITS DISPOSAL OR IN THE ALTERNATIVE REQUIRE PETITIONER TO FURNISH THE APPENDICE(S) AT A DATE CERTAIN.

THE OMISSION OF APPENDICES IS NOT INTENDED TO MINIMIZE THE IMPORTANCE OF ANY ONE APPENDICE AND PETITIONER PRAYS THIS COURT WILL ACCEPT THIS EXPLANATION IN THE SPIRIT INTENDED, TO HAVE THIS PETITION FILED ON TIME BY ONE WHO GREATLY RESPECTS RULES OF COURTS AND FULLY INTENDS TO ABIDE BY SUCH RULES. PETITIONER CAN ONLY PRAY THAT THIS PETITION WILL NOT BE

VIEWED *DE MINIMUS* BY THE OMISSION OF ANY ONE APPENDICE.

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF MANDAMUS/PROHIBITION
RULE 20(3)

Petitioner respectfully prays that a writ of mandamus/prohibition rule 20(3) will issue that will review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts:**

The opinion of the United States Court of Appeals for the 11th Circuit appears at Appendix A to the petition and is
[x] unpublished.

The opinion of the United States District Court appears at Appendix B to the petition and is
[x] unpublished.

JURISDICTION

[x] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was August 14, 2006.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals for the 11th Circuit on the following date: August 4, 2006, and a copy of the order denying rehearing appears at Appendix A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __ A ____.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

DOUBLE JEOPARDY CLAUSE OF THE 5TH AMENDMENT TO THE CONSTITUTION

ARTICLE 1, SECTION 9, CLAUSE 3
{EX POST FACTO VIOLATION}
OF THE CONSTITUTION

STATUTORY:

26 USC 7201
26 USC 7206(2)
26 USC 7212(a)
28 USC 1651(a)
28 USC 2253 (c) (2)
27 USC 2255

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STATEMENT OF THE CASE

Appellant completed a 3-year term of supervised release on November 19, 2001 and is no longer in custody.

On March 17, 1993 Appellant was indicted by a Middle District of Florida grand jury on 13-counts. On July 2, 1993 Appellant pled guilty to count 1, "Corrupt Interference With The Administration Of The Internal Revenue Laws," 26 USC 7212(a) {"7212(a)"} and Count 11, "Tax Evasion," 26 USC 7201 {"7201"} for tax year 1987 and the remaining counts 2 through 10, 12 and 13 were dismissed. A Presentence Report {"PSR"} dated March 31, 1994 determined that the tax loss was at least $800,000 to less than $1,500,000 which resulted in a base offense level {"BOL"} of 17 from the tax table at United States Sentencing Guidelines {"USSG"} 2T4.1, the United States District Court {"DC"} using the November 1, 1989 version of the USSG. After enhancements of 6-levels for specific offense characteristics {"SOC"} from 2T1.4 and a 2-level upward departure for obstruction of justice, 3C1.1, the court using a total offense level of 25 and a CHC II, sentenced Appellant as follows: 63-months imprisonment [60-months for 7201 {count 11} and 3-months for 7212(a) {count 1}]; 3-year term of supervised release; fine of $100,000 {7201 - $50,000 and 7212(a) - $50,000}; special assessment of $100; required Appellant during his term of supervised release to:

(a) comply with IRS in making restitution of slightly less than $1,500,000;

(b) prohibited Appellant from engaging in employment involving preparation of tax returns; and (c) to participate in a program of mental health treatment as approved by the US Probation Office.

Appellant's initial appeal with the 11th Cir. {docket no. 94-2491} was dismissed without prejudice and opinion when the 11th Cir. granted "Appellee's Motion For Reconsideration Of This Court's Denial Of Its Motion To Dismiss The Appeal" and in the same order the 11th Cir. granted "Appellee's Motion To Dismiss The Appeal" and did so pursuant to United States v. Buchanan, 131 F3d 1005 (11 Cir 1997) which held that an appeal from a Plea Agreement should be dismissed "sooner than later." It must be noted that in 11th Cir. case no. 94-2491 the INITIAL BRIEF by Appellant and ANSWER BRIEF by the government had been filed and all that remained was for Appellant's court-appointed attorney, Michael Alan Ceballos {"Ceballos"} to file Appellant's REPLY BRIEF which Ceballos REFUSED to do. Ceballos was later disbarred from practicing law before the 11th Cir. and suspended from practicing law in the state of Florida by the Supreme Court of Florida. Thus the issue of mal-practice/professional liability continues to be a major factor in Appellant seeking to have his sentence and conviction reviewed by the judiciary and until this occurs the professional liability issue remains "in limbo."

Then on 11/17/99, in docket no. 99-13170-D, the 11th Cir. GRANTED Appellant a CERTIFICATE OF APPEALABILITY on the following issue:

> "Whether the district court erred in dismissing Appellant's Motion To File An Enlarged 'Motion To Vacate Sentence, 28 USC 2255' 'Renewed Motion To File An Enlarged Motion To Vacate Sentence, 28 USC 2255,' and 'Application For Writ Of Error Coram Nobis'...Appellee's Motion To Dismiss The Appeal Is Denied. " 11th Cir Order of 11/17/99, Dkt 99-13170-D at pg 1.

Then on 6/20/2000, in a PER CURIAM OPINION {Appendix J}, the 11th Cir. VACATED and REMANDED in accord with its opinion and followed with its JUDGMENT/MANDATE filed on August 29, 2000 {Appendix I}.

The DC would remain silent from 8/29/2000 through 12/11/2001 or 16-months and did so in defiance of 11th Cir. docket no. 99-13170-D causing Appellant to pepper the DC with numerous motions {DE 134, DE 136, DE 137, DE 138, DE 140, DE 143, and DE 145}, pleadings that demanded the DC to comply with 99-13170-D. The record will show that the DC in DE 139 DENIED all pleadings and in so doing the DC was in fact VIOLATING 99-13170-D.

The DC's denials forced Appellant to file still another appeal that became 11th case no. 01-17101-C, that required still another filing fee only to have the 11th Cir. DISMISS WITHOUT PREJUDICE 01-17101-C {Appendix F} for lack of jurisdiction, the 11th Cir. noting that the DC had not issued a DISPOSITIVE ORDER that it had mandated the DC to issue in 99-13170-D. In other words the DC totally ignored the 11th Cir. opinion/judgment/mandate of 99-13170-D and has the audacity to state in DE 289 that "...Defendant's seemingly unending and baseless filings only serve to clog the judicial system and delay other cases. Defendant should recognize that this court gives each motion filed in any case a thorough and expeditious review." DE 289 at 2. If the nation's highest court does not "see through" Judge Schlesingers' remarks in DE 289, then it is crystal clear that there cannot and will not be justice in this long and protracted convoluted proceeding brought on by Schlesinger. This amounts to an egregious abuse of discretion by a trial judge who does NOT give each case a thorough and expeditious review as he so claims.

Then on 7/30/2002 the DC held a DISPOSITIVE ORDER hearing after it granted DE 152 {it took 25-months/10 pleadings/ an 11th Cir. appeal to get this hearing.}On 11/5/02, in DE 153 {Appendix E} the DC DENIED APPELLANT'S INITIAL MOTION TO VACATE 28 USC 2255, a 2255 which had been filed 4-years earlier on 12/28/98 {DE 96}. In sum, the DC waited 4-years to rule on a 2255. In DE 154 Appellant filed a Motion for Reconsideration and followed with DE 155, a Supplement to 154 and both were DENIED in DE 157. Appellant recognizing that he was without a legal sentence after the 11th Cir. vacated and remanded in 99-13170-D proceeded to file pleadings demanding that he be resentenced while concomitantly advising the DC that its VIOLATION OF 26 USC 7212(a) AMONGST OTHER ERRORS OF LAW RENDERED APPELLANT'S SENTENCE NULL AND VOID {SEE DE 285 FOR A LIST OF 20-VIOLATIONS, ERRORS OF LAW AND/OR ABUSES OF DISCRETION BY THE DC THAT IS THE BASIS FOR RESENTENCING.}

The record reveals that because of the DC's failure(s) to respond to 11th Cir. mandates and its failure(s) to respond to Appellants' pleadings, that, not only does the DC docket now number 297 docket entries dating back to 3/31/94, but the failures have required Appellant to file nineteen (19) appeals with the 11th Cir., namely: 94-2491 (initial); 99-13170-D; 00-10432-DD; 01-17101-C; 02-16449-BB; 03-13294-A; 03-16090-I; 04-10560-I; 04-11046-I; 04-

11333-I; 04-11844-I; 04-12456-I; 04-14490-E; 04-14491-E; 04-16170-E; 05-10289-B; 05-10290-B; 05-13724-D and finally 05-15144-DD.

STATEMENT OF THE FACTS

In the Addendum to the PSR {Appendix K}, Appellant objected to the following:

{1} In paragraph 10 of the PSR, he objects to the tax liability shown for the tax years 1984 through 1988 and indicates the correct tax liability for these years;

{2} In paragraph 11 of the PSR, he states the IRS has not provided any documentation to support the alleged tax loss of $800,000 to less than $1,500,000 which the DC used to derive a BOL of 17;

{3} In paragraph 22 of the PSR, he objects to the 2-level upward departure for obstruction of justice, USSG 3C1.1 as he signed a PROFFER on 1/11/90 which was 39-months prior to his indictment on 3/17/93.

{4} Argued that he is eligible for a 2-level downward departure for Acceptance of Responsibility {FN 2}, USSG 3E1.1 based solely on the PROFFER signed on 1/11/90. The signing of a PROFFER translates into Appellant agreeing to plea out early on, which means that he CANNOT obstruct justice but has accepted responsibility {FN 2}. Yet the DC ignored the PROFFER filed with IRS, DOJ and the United States Attorney's office.

(FN 2) In DE 161 the DC admits it erred on Acceptance of Responsibility:

COURT: Mr. Powerstein, I'm a human being and I make mistakes – that's why we have appellate courts – and I did make a mistake when I said no acceptance of responsibility. So instead of having a total offense level of – what was it, I don't know.

POWERSTEIN: I started with 25 and it may go down to almost nothing.

COURT: So suppose I say to myself, instead of the offense level being 25, it should have been 6-months.

POWERSTEIN: Okay, good.

COURT: And what I should have said is you fell in the zero to 6-month range. What did I sentence you to?

POWERSTEIN: 63-months.

COURT: I gave you 63-months. Suppose I say it should have only been 6-months.

POWERSTEIN: Okay.

COURT: What is the court to do?

DE 161, Dispositive Order Hearing of 7/30/2002 at 43/19-23; 44/1-11.

REASONS FOR GRANTING THE PETITION

Powerstein respectfully requests the high court grant a writ of mandamus/prohibition {Rule 20(3)} and states:

I. VIOLATION OF A FEDERAL STATUTE

1. At sentencing the DC violated 26 USC 7212(a) {ST of 3/31/94 at 24/19-22} which results in the DC relinquishing subject matter jurisdiction over its sentence, which is non-waivable, causing the sentence to be null and void that must result in Powerstein's resentencing. This egregious error of law has gone undetected, unnoticed and unaddressed from 3/31/94 or a total of 12 ¾ years.

II. WRIT OF ERROR CORAM NOBIS

2. Powerstein has filed a timely Writ of Error Coram Nobis under the All Writs Act, 28 USC 1651(a) {DE 137 filed 11/20/2001} that conveys jurisdiction to the DC, which jurisdiction is limited to a review of errors of the most fundamental character. The DC denied the Writ without opinion {DE 139}. It is abundantly clear that Petitions for Coram Nobis are used in the most extraordinary cases so as to achieve justice in which justice has gone undetected, unnoticed and unaddressed by the courts. Certainly, a VIOLATION OF A FEDERAL STATUTE is such an error of the most fundamental character and justice will not be achieved unless and until this court addresses this issue and grants the writ.

III. ABUSE OF DISCRETION STANDARD IS REVIEWABLE

3. The United States Supreme Court has given appeals courts jurisdiction to review errors of law, e.g., a VIOLATION OF A FEDERAL STATUTE AT SENTENCING IS SUCH AN ERROR OF LAW and may do so under the abuse of discretion standard. See Koon v. United States, 518 US 81, 116 S Ct 2035, 2047, 135 L Ed 2d 392 (1996) (A district court by definition abuses its discretion when it makes an error of law.) Koon, 116 S Ct at 2047.

IV. 11th CIRCUIT VACATED AND REMANDED

4. The 11th Cir. in a PER CURIAM OPINION, docket no. 99-13170-D filed 6/20/2000 {Appendix J} advised the DC of a legal error and the 11th Cir. followed with a judgment/mandate filed on 8/29/2000 {Appendix I}. Then on 4/12/2002 or 2-years later, the 11th Cir. rendered an opinion in 01-17101-C

{Appendix F}, an appeal Powerstein was forced to file simply because the DC DENIED ALL OF POWERSTEINS' PLEADINGS THAT DEMANDED THE DC ISSUE A DISPOSITIVE ORDER, AN ISSUE THAT AROSE IN 99-13170-D WHICH REQUIRED THE DC TO ISSUE AN ORDER WHICH IT REFUSED TO DO THAT FORCED POWERSTEIN TO FILE STILL ANOTHER APPEAL. THE 11TH CIR., IN ITS 4/12/2002 OPINION RESPONDED TO A JURISDICTIONAL ISSUE IT RAISED SUA SPONTE ADVISING THE DC THAT ITS 12/12/2001 ORDER {APPENDIX H} DOES NOT DISPOSE OF THE UNDERLYING ACTION OR END THE LITIGATION ON THE MERITS.

V. ANOMALY

5. In sentencing Powerstein on 3/31/94 the DC created an anomaly when it meted out a 60-month term of imprisonment for offense of conviction, 26 USC 7201 and a 3-month term for offense of conviction 26 USC 7212(a); however, the vast majority {87%} of the tax loss of $800,000 to less than $1,500,000 is attributable to 7212(a); the 6-level enhancement from USSG 2T1.4 is attributable to 7212(a); and the 2-level upward adjustment from USSG 3C1.1 is attributable to 7212(a); yet the DC sentenced Powerstein to a 3-month term for 7212(a) and a 60-month term for 7201. This disproportionate sentence, otherwise an ANOMALY must be addressed and corrected, otherwise the result will be a gross injustice to Powerstein that strikes at the pillars of justice and at the heart of our judicial system.

VI. 20- VIOLATIONS, ERRORS OF LAW AND/OR ABUSES OF DISCRETION

6. Powerstein asserts that a sentence, illegally imposed, cannot and must not go undetected, unnoticed and unaddressed. Such an illegal sentence, if allowed to stand, strikes at the "heart and soul" of our judicial system and would send a signal to the judicial branch of government that sentences may be illegally imposed and the government, by its silence would be sanctioning such an illegal sentence.

What follows are 20-violations, errors of law and/or abuses of discretion committed by Schlesinger {DC} who was advised of this in DE 282, filed 7/21/05:

1. Violation of 26 USC 7212(a);

2. Violation of the Ex Post Facto Clause of the Constitution, Art. 1, Sec.9, Cl.3;
3. Violation of the DJC of the 5th amendment to the Constitution;
4. Violation of USSG 2T1.3;
5. Violation of USSG 2T1.4;
6. Abused his discretion when he stated he does not agree with the commentary in the guidelines {ST of 3/31/94 at 6/20-23}. See Stinson v. United States, 113 S Ct 1913, 1915 (1993);

7. Erred when he used dismissed counts to depart upward. See United States v. Faulkner, 952 F2d 1066 (9 Cir 1991); United States v. Castro-Cervantes, 927 F2d 1079 (9 Cir 1990); United States v. Ruffin, 997 F2d 343 (7 Cir 1993); United States v. Ashburn, 20 F3d 1336 (5 Cir 1994) and 38 F3d 803 (5 Cir 1994);

8. Failed to recognize that the sentence meted out on 3/31/94 straddled pre (parole law) and post {USSG} law; however, the sentence was based solely on USSG law and ignored parole law;

9. Erred when he stated in the final judgment that defendant was required to comply with IRS authorities in making restitution of slightly less than $1.5 million; however, the AUSA stated at the plea hearing that there is no restitution {PT of July 2, 1993 at 2/14 to 5/18 inclusive);

10. Erred in DE 94 when he held that DE 93 was Powerstein's 1st 28 USC 2255 {"2255"} when in fact it was a motion under MDOF local rules to file an ENLARGED 2255 AND WAS NOT THE FILING OF A 2255;

11. Erred in DE 97 when he held DE 96 to be a 2d successive 2255 when it fact it was defendant's 1st 2255;

12. Erred in DE 139 {Appendix H} when he denied DE 136 in which defendant sought to set a dispositive order hearing date, mandated by the 11th Cir. in 99-13170-D, which denial forced Powerstein to file still another appeal, docket no. 01-17101-C due to Schlesingers' inactions and silence;

13. Erred and abused its discretion in DE 153 when it misrepresented what Martin v. United States, 81 F3d 1083 (11th Cir 1996) and McCoy v. United States, 266 F3d 1245 (11th Cir 2001) stand for. In other words the DC failed to accurately cite both cases;

14. Created an ANOMALY when the DC imposed a sentence of 60-months for 26 USC 7201 and 3-months for 26 USC 7212(a) {ST of 3/31/94 at 24/16-18};

15. Stated in DE 161 of 7/30/2002 at 43/19-23 and 44/1-11 that it made a mistake when it failed to give Powerstein a downward departure for acceptance of responsibility pursuant to USSG 3E1.1;
16. Failed to recognize that Powerstein signed a PROFFER early on {1/11/1990} or 38-months PRIOR to his indictment on 3/17/1993, a PROFFER that was filed with IRS, DOJ and the United States Attorney's office; however, the DC abused its discretion when it departed upward for obstruction of justice, USSG 3C1.1 {a 2-level increase}. To be enhanced for 3C1.1 Powerstein had to significantly hinder or impede the investigation and having signed a PROFFER runs contra to hindering or impeding an ongoing investigation;
17. With 40% of the sentencing transcript devoted to mental health, the DC abused its discretion when it failed to allow or even consider a USSG 5K2.13 downward departure;
18. When Powerstein was asked to cooperate with the IRS, this meant he qualified for a USSG 5K1.1 downward departure that was never considered by either the DC or the government;
19. The AUSA lied to the court at sentencing when he advised the DC that a certificate of deposit {"CD"} of $100,000 existed at 3/31/94, when in fact it had been closed out on October 7, 1993 and this was confirmed in writing by the California Federal Bank; notwithstanding that the DC on 7/27/95 at a hearing ordered by the 11th Cir. for the purpose of appointing Michael Alan Ceballos as Powerstein's court-appointed appellate attorney, a hearing in which the DC heard testimony on this CD issue and agreed that it did NOT exist on 3/31/94;
20. The DC erred when it issued DE 266, filed 3/30/2005, the court knowing or ought to have known that 11th Cir. docket no. 05-10290-B was then pending before the 11th Cir., which meant that the DC is PROHIBITED from issuing rulings or orders pending the outcome of the appeal then in progress {05-10290-B}. See Shewchun v. United States, 797 F2d 941, 942 (11 Cir 1986) (Filing of appeal divests trial court of jurisdiction over matters at issue in appeal except to extent that trial court must act in aid of appeal.) (citing United States v. Hitchmon, 602 F2d 689, 692 (5th Cir 1979) (En Banc).

VII. EXTRAORDINARY WRIT OF ERROR CORAM NOBIS, MANDAMUS/PROHIBITION

7. It is for the following reasons that the nation's highest court is asked to issue a writ of mandamus/prohibition {rule 20(3)}.

(a) Violation of a federal statute at sentencing {26 USC 7212(a)} that strips the DC of subject matter jurisdiction over the sentence it imposed, that is non-waivable, causing the sentence to be null and void;

(b) Violation of the USSG at sentencing {2T1.3 and 2T1.4};

(c) An Anomaly wherein Powerstein was sentenced to 63-months, split 60-months for 26 USC 7201 and 3-months for 26 USC 7212(a); however, Powerstein has demonstrated that the vast majority {87%} of the final offense level of 25 is attributable to 7212(a) to which the DC meted out a 3-month term of imprisonment;

(d) An error of law by the DC followed by an abuse of discretion by the 11th Cir. when the appeals court failed to review the DC's error of law that it is empowered to do by Koon v. United States, supra;

(e) The 11th Cir. and DC ignoring todate the filing by Powerstein of a Petition For A Writ of Error Coram Nobis, 28 USC 1651(a), both courts knowing or ought to know that a Coram Nobis filing is limited to a review of errors of the most fundamental character and certainly a violation of a federal statute at sentencing fits squarely within the framework of Coram Nobis. A review of the DC docket reveals that Powerstein asked for Coram Nobis relief on 30-occasions and in each instance was denied relief without opinion and without prejudice.

Docket Entry	Date Filed	Docket Entry	Date Filed
100	5/11/99	105	7/7/99
110	7/28/99	112	8/6/99
115	9/03/99	124	11/22/99
137 (1)	11/20/01 (1)	145	12/27/01
172	8/01/03	174	8/25/03
177	9/04/03	179	9/15/03
182	10/10/03	185	11/03/03
188	11/24/03	190	1/13/04
193	2/02/04	195	2/17/04
196	3/02/04	200	3/15/04
203	4/14/04	205	5/14/04
207	5/14/04	212	6/04/04
213	6/04/04	214	6/17/04
219	7/13/04	221	8/17/04
226	8/30/04	233	9/15/04

(1) Powerstein is no longer in custody.

All of the above, cumulatively, must result in this court granting an Extraordinary Writ of Error Coram Nobis, 28 USC 1651(a), All Writs Act that will recognize that an Anomaly has occurred based upon egregious errors that have gone undetected, unnoticed and unaddressed for 12 ¾ years.

VIII. OF NATIONAL IMPORTANCE

8. This nation's highest court must recognize that the instant case is one of national importance for the following reasons:

(a) A violation of a federal statute at sentencing that is allowed to go undetected, unnoticed and addressed by the courts, despite the court being advised of such an egregious error by Powerstein that is corroborated by a DC docket that numbers 297 entries and an appeals docket that numbers 19-filed appeals, which error has been carefully and methodically ignored by both Judge Schlesinger and AUSA Mark B. Devereaux, strikes at the "heart and soul" of our judicial system which Powerstein believed was judicious but is called into question by a trial judge that admits he erred but refuses to recognize that corrective measures must be taken to redress the wrong(s).

Unless the high court pierces the veil that has been a shadow over this issue from its origin on 3/31/94, then it is obvious that there never can or will be justice in our legal system and this will send signals to district courts as well as courts of appeals that trial judges who are told that their sentence and conviction are illegal can ignore the "cries" from defendants and cover-up their errors of law because these courts believe that our nation's highest court will stand idly by and allow the injustice to continue and even quash any attempt to expose these flawed orders and opinions. In other words, "keep doing what you do best" and we, the Supreme Court will stand idly by and look the other way. It is insane to believe this will happen in the instant case. "JUSTICE IGNORED IS JUSTICE DENIED."

(b) Powerstein reminds this court that he has "traveled" many routes to get the DC's violations, errors of law and/or abuses of discretion addressed that include:

{1} Direct appeal to the 11th Circuit;
{2} Motion To Vacate Sentence, 28 USC 2255;
{3} Writ of Error Coram Nobis;
{4} Second or Successive Motion to Vacate Pursuant to 28 USC 2255;

{5 Certificate of Appealability pursuant to 28 USC 2253(c)(2);

{6} Koon v. United States, supra, on the issue of whether the11th Cir. can review a trial court's error of law under the abuse of discretion standard;

{7} United States v. Booker/Fanfan, 125 S Ct 738 (2005) {See XIV infra};

{8} Extraordinary Writ of Error Coram Nobis, 28 USC1651(a) {Rule 20}.

(c) There is no margin of error for district court judges, e.g., Schlesinger, who when made aware of their violations, errors of law and/or abuses of discretion do nothing more than write "DENIED" on each and every pleading put before them and have the audacity to state the following in DE 289:

> Court: Defendant's seemingly unending and baseless filings only serve to clog the judicial system and delay other cases. DC Order of 8/30/2005, DE 289 at 2.

In contrast and contradiction to the court's colloquy, consider the following:

Court: Because you are very articulate, you are very intelligent and what you put down on paper does make good sense. DC Order, DE 294 at 11/2-4.

(d) Of national importance is our "Constitution" that does not exist in the minds of district court judges who have taken an oath to uphold so sacred a document, but when challenged will ignore its very existence only to "save their skin." This kind of behavior shocks the conscience of any law abiding citizen who still believes this great nation has a "Constitution."

IX. ADMISSION BY SCHLESINGER THAT HE ERRED

9. In DE 161 of 7/30/2002 Schlesinger openly admits on the record that he erred in this convoluted proceeding that now spans 12 ¾ years with 297 entries:

> Court: Mr. Powerstein, I'm a human being and I make mistakes – that's why we have appellate courts – and I did make a mistake when I said no acceptance of responsibility. So instead of having a total offense level – what was it, I don't know.

Powerstein: I started with 25 and it may go down to almost nothing.

> Court: So suppose I say to myself, instead of the offense level being 25, it should have been 6.

Powerstein: Okay, good.

Court: And what I should have said is you fell in the zero to 6-month range.
What did I sentence you to?
Powerstein: 63-months.
Court: I gave you 63-months. Suppose I say it should have only been 6-months.
Powerstein: Okay.
Court: What is the court to do?
DE 161 of July 30, 2002 at 43/19-23; 44/1-11.

X. VIOLATION OF THE DOUBLE JEOPARDY CLAUSE {"DJC"}

10. Appellant asserts that an argument for DJC continues to have vitality in the instant case, notwithstanding that although the United States Supreme Court in Hudson v. United States, 522 US 93, 118 S Ct 488, 139 L Ed 2d 450 (1997), disavowed the United States v. Halper, 490 US 435, 109 S Ct 1892, 104 L Ed 2d 487 (1989) method of analysis, noting that where in the instant case Appellant was ordered to pay civil fraud penalties of $197,455 in his civil tax case with the IRS, now in the United States Tax Court under docket nos. 30261-89 and 13443-92 and then ordered to pay a criminal fine of $100,000 in his criminal case no. 5:93-6-cr-oc-20, where both fines/penalties are for the same offense conduct of "Tax Evasion," and where the government has not tendered any amount for a loss it incurred, causing the civil fraud penalties to be deemed deterrent and retributive but not remedial, that such a scenario where there are 2-separate and distinct proceedings, with 2-separate judges, where the offense charged is the same for both proceedings and with 2-different courts for the 2-proceedings, that such a scenario will trigger the 3d prong of the DJC, which prohibits multiple criminal punishments for the same offense. Witte v. United States, 515 US 389 (1995); Helvering v. Mitchell, 303 US 391, 398-99, (1938) and DJC prevents "successive punishments...successive prosecutions." See United States v. Dixon, 509 US 688, 696 (1993), citing North Carolina v. Pearce, 395 US 711 (1969).

In Justice Stevens concurrence of only the majority's decision in Hudson, supra, wherein he refused to join the court's opinion, Justice Stevens is quick to point out that any fine or sentence imposed on the criminal counts would be "punishment." If the indictment charged the same offense for which punishment has already been imposed, the prosecution itself would be barred by the DJC no matter how minor the criminal sanction sought in the

proceeding. In United States v. LaFranca, 282 US 568 (1931), the court held that penalty is punishment and the words tax and penalty are not interchangeable. The Supreme Court then held:

> "...That the exaction here in question is not a true tax, but a penalty involving the idea of punishment for infraction of the law is settled by Lipke v. Lederer, 259 US 557, 561-62....But an action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding, although it take the form of a civil action; and the word 'prosecution' is not apt to describe such an action."
> LaFranca, 282 US at 572/575.

It is important to note that the order of the 2-proceedings matters not under DJC, albeit Powerstein's civil tax case preceded his criminal case. See Department of Revenue of Montana v. Kurth Ranch, 511 US 767, 114 S Ct 1937, 128 L Ed 2d 767, 794 (1994). This court must now find that in the instant case there has been a violation of the DJC, namely that Powerstein having satisfied the Blockburger test {Blockburger v. United States, 284 US at 304, 52 S Ct at 182, 76 L Ed 306 (1932)} while passing muster under the Kaiser test {United States v.Kaiser, 893 F2d 1300 (11th Cir 1990) that serves to remove any bar to arguing the DJC, that the lesser included offense of 26 USC 7212(a) is then merged into the greater "capstone" offense of 26 USC 7201, so that 7212(a) is no longer an offense of conviction, with the criminal fine of $100,000 no longer valid and must be usurped as it would amount to a 2d punishment for the same offense of tax evasion. See Witte, supra; Helvering, supra; Dixon, supra; and North Carolina, supra. It follows that Powerstein's 2d proceeding, the criminal prosecution now construed under DJC to be MULTIPLE PUNISHMENTS FOR THE SAME OFFENSE OF TAX EVASION MUST BE REVERSED BY THIS COURT.

Lastly, it is crucial for any DJC argument that Powerstein pass muster under both the Kaiser and Blockburger tests. In Kaiser, the 11th Cir. held:

> "Kaiser's guilty plea did not waive his right to raise the double jeopardy clause and the convictions and consecutive sentences for tax evasion and for filing a false return, constitute in this case, violation of the double jeopardy clause."
>
> .....
>
> "That congressional intent is not clear from the statute itself so it must turn to the Blockburger test to determine whether the offenses of which Kaiser was convicted are sufficiently distinguishable to permit cumulative punishment....In Blockburger v. United States, 284 US at 304, 52 S Ct at 182, 76 L Ed 306 (1932), the Supreme Court held

> that '[t]he applicable rule is that where the same act or transaction constitutes a violation of 2-distinct statutory provisions, the test to be applied to determine whether there are 2-offenses or only one is whether each provision requires proof of an additional fact which the other does not'."....."For the foregoing reasons, we find that Kaiser may not be convicted and senteced for both the greater offense of tax evasion and the lesser included offense of filing a false tax return. Thus the convictions.... on tax evasion counts are affirmed, but the convictions....[for] the lesser included filing false [returns] are vacated." Kaiser, 893 F2d at 1302, 1305 and 1307.

Due to the great significance of the Blockburger test, also known as the "same elements test," Powerstein asserts that in the instant case, NEITHER STATUTORY PROVISION TO WHICH POWERSTEIN PLED, NAMELY 26 USC 7201/7212(a) REQUIRES PROOF OF AN ADDITIONAL FACT WHICH THE OTHER DOES NOT and this conclusion is supported by the following tabulation:

26 USC 7201:	26 USC 7212(a)
(a) Willfulness; {Voluntary intentional violation of a known legal duty, e.g., to not file a true tax return};	(a) Corruptly; {Gain unlawful benefit for oneself or another}
(b) Existence of a tax deficiency;	(b) Existence of a [w]ritten letter or other form of communication;
(c) An affirmative act of evasion of tax or attempted evasion of tax.	(c) An affirmative act to obstruct or impede the due administration of this title.

XI. SCHLESINGER HAS THE AUTHORITY TO GRANT THE RELIEF SOUGHT

11. In DE 289 of 8/30/05 the court states:

Court: The court has made crystal clear that it does not have the authority to provide defendant with the relief he seeks. DE 289 of 8/30/05 at 2. Powerstein requires ten {10} responses to respond to the above colloquy:

{1} The DC concluded in DE 161 {DISPOSITIVE ORDER HEARING} that Powerstein is ENTITLED TO A CERTIFICATE OF APPEALABILITY{"COA"}

Court: You're entitled to a certificate of appealability.

DE 161 of 7/30/2002 at 29/25; 30/1.

It is "crystal clear" that Powerstein is entitled to a COA, yet on 12/18/2001, the DC denied Powerstein a COA {Appendix "G"} and on 5/13/03 and 6/13/03 the 11th Cir. denied Powerstein a COA, docket no. 02-16449-BB {Appendix C}.

{2} The DC admitted at the Plea Hearing held on 7/2/93 that Powerstein can appeal any sentence the court imposes.

Court:: ..Both you or the prosecutor could appeal any sentence that I impose. PT of 7/2/93 at 26/17.

The DC made it crystal clear that Powerstein can appeal any sentence the court imposes and Powerstein carried this with him for the next 12 ¾ years. Yet, through the date of this filing, Schlesinger remains determined to bar Powerstein from filing any further pleadings with his court subject to the pains and penalties of contempt of court. {DE 289 of 8/30/2005}

{3} The DC admitted at sentencing on 3/31/94 that Powerstein can appeal his sentence and he said so in the following manner:

Court: If I remember correctly, with respect to the right to appeal I think you gave up your right except if I departed upward from the guidelines, which I leave that to your discretion as to whether I have or have not. ST of 3/31/94 at 28/6-9.

Response: From a careful scrutiny of the court's colloquy, we see that Appellant has the right to appeal to the extent the DC departed upward from the guidelines and this is in sharp contrast from the plea hearing colloquy when the DC stated, "Both you or the prosecutor could appeal any sentence that I impose." PT of 7/2/93 at 26/17.

Powerstein will now demonstrate that despite the sharp contrast between both colloquies, that he can appeal from the colloquy at ST of 3/31/94 at 28/6-9, namely, "...except if I departed upward from the guidelines..." Here is why:

Powerstein's final offense level of 25 consisted of:

BOL.....17
SOC's {Ch. 2}.....6
3C1.1 {Ch. 3}.....2
Total 25

SOC's and 3C1.1 are DEEMED UPWARD DEPARTURES pursuant to United States v. Otero, 868 F2d 1412 (5 Cir 1989); see also United States v. Kim, 896 F2d 678 (2 Cir 1990). Accordingly, Powerstein can appeal from both court colloquies.

{4} The DC erred when it enhanced Appellant's final offense level with 6-SOC from USSG 2T1.4,which is from a dismissed count and not an offense of conviction {26 USC 7206(2)}. This is err as the DC failed to recognize that dismissed counts cannot be used to support upward departures. See:
United States v. Ashburn, 20 F3d 1336 (5 Cir 1994); 38 F3d 803 (5 Cir 1994)
United States v. Castro-Cervantes, 927 F2d 1079 (9 Cir 1990)
United States v. Faulkner, 952 F2d 1066 (9 Cir 1991) and
United States v. Ruffin, 997 F2d 343 (7 Cir 1993).

{5}Powerstein's Plea Agreement of 7/2/93 includes a SENTENCE APPEALWAIVER {"SAW"} that was NOT KNOWING AND VOLUNTARY. That pursuant to United States v. Bushert, 997 F2d 1343 (11th Cir 1993), cert. den. 115 S Ct652 (1994), the SAW must be severed from Powerstein's Plea Agreement as it was not knowing and voluntary, while leaving the remainder of the Plea Agreement intact. The following will support severance of the SAW:

Court: Both you or the prosecutor could appeal any sentence that I impose. PT of 7/2/93 at 26/17.

Court: If I remember correctly, with respect to the right to appeal, I think you gave up your right except if I departed upward from the guidelines, which I leave that to your discretion as to whether I have or have not. ST of 3/31/94 at 28/6-9.

It is indisputable that both colloquies are INCONSISTENT with each other, yet Powerstein has demonstrated that under either scenario he can appeal the Court's sentence. Bushert, supra, stands for severing a SAW which is NOT KNOWING AND VOLUNTARY. Accordingly, in the instant case, the SAW is clearly and indisputably NOT KNOWING AND VOLUNTARY that requires severance of the SAW leaving the remainder of the Plea Agreement intact.

{6} Powerstein experienced extreme ineffective assistance of counsel when his trial attorney, Michael Alan Ceballos, who later was court-appointed for appellate purposes was disbarred from practicing law in Florida by the Florida Supreme Court and disbarred from practicing before the 11th Cir. after 2-investigations by the Lawyers Committee on Qualifications that occurred twice during the pendency of Powerstein's initial appeal, docket no. 94-2491.

{7} The government agrees that Powerstein can seek the relief he asks for without the threat of contempt of court when AUSA Mark

B. Devereaux stated his position in a motion filed with the 11th Cir. in docket no. 94-2491 {1st appeal) which motion was made part of the record in DE 110 and DE 140:

"...Defendant cannot appeal except to the extent the sentence imposed included an upward departure from the sentencing guidelines, was in excess of the statutory maximum, or was in violation of the law apart from the sentencing guidelines." {Emphasis by Powerstein}

AUSA Devereaux motion filed on 4-3-98 in 94-2491. {Appendix P}

Powerstein argues that he fits squarely within the framework of the AUSA's motion and for the following reasons:

(a) When the DC violated 26 USC 7212(a) at sentencing, this would comport with, "...was in excess of the statutory maximum..." that AUSA Devereaux agrees will allow Powerstein to appeal his sentence;

(b) When the DC violated the Ex Post Facto Clause, Art. 1, Sec. 9, Cl. 3 of the Constitution, this would comport with, "...was in violation of the law apart from the sentencing guidelines" that AUSA Devereaux agrees will allow Powerstein to appeal his sentence; and

(c) When the DC violated USSG 2T1.3 and 2T1.4, this would fit squarely within AUSA Devereaux's motion that states in part:: "...Defendant cannot appeal except to the extent the sentence imposed included an upward departure from the sentencing guidelines, ...or was in violation of the law apart from the sentencing guidelines," {AUSA motion of 4-3-98 at page 1/paragraph 1}. The government motion paves the way for Powerstein to appeal his sentence and conviction as it is indisputable that when the final offense level included upward departures of 8-levels {6-SOC + 2 from 3C1.1}, that such a scenario clears the way for Powerstein to appeal to the 11th Cir.

{8} Pursuant to a Writ of Error Coram Nobis, the DC can and must grant the relief Powerstein seeks, as he is NOT in custody. Black's law dictionary (7th Ed. 1999) defines Coram Nobis as follows:

"A writ of error directed to a court for review of its own judgment and predicated on alleged errors of fact."

In DE 214/221, Powerstein also provided the DC with clear evidence that he fits snugly within the American Jurisprudence 2d {"Am Jur"} definition of Coram Nobis and furnished case history to support his contention that he qualifies for Coram Nobis relief.

AM JUR DEFINITION	UNITED STATES v.POWERSTEIN
{1} A common-law writ used when no other remedy is available to set aside a judgment because of an error of fact;	{1} The DC has denied a COA to set aside a defective final judgment which violated 26 USC 7212(a) {"violation"} at sentencing;
{2} Provided such error does not appear on the record;	{2} The violation does not appear on the record;
{3} Was not put in issue at trial;	{3} The violation was not put in issue at trial;
{4} Was unknown to both the court and party seeking relief at trial;	{4} The violation was not known to both the DC and Powerstein through final sentencing;
{5} Had the error of law been known it would have prevented rendition of the judgment;	{5} The violation, if known at sentencing would have prevented rendition of the final judgment meted out on 3/31/94;
{6} Federal All Writs Act, 28 USC 1651 (a) makes a Writ Of Error Coram Nobis available in criminal cases.	{6} The violation must now be addressed pursuant to 28 USC 1651(a) {instant case};

In addition, there is an abundance of case law to support Powerstein's argument that he is entitled to Coram Nobis relief that include the following:

Alikhani v. United States, 200 F3d 732 (11 Cir 2002);
Warton v. United States, 971 F2d 756 (11 Cir 1992);
United States v. Brown, 117 F3d 471 (11 Cir 1997);
United States v. Mayer, 235 US 55 (1914);
United States v. Mills, 221 F3d 1201 (11 Cir 2000);
United States v. Morgan, (FN 3) 346 US 502 (1954).

(FN 3) As the Supreme Court noted in Morgan, supra (An application for a Writ Of Error Coram Nobis is of the same general character as [a motion] under 28 USC 2255.) Morgan, 346 US at 506 n. 4.

{9} Powerstein petitioned the DC to vacate based upon an ANOMALY {DE 250} that the DC created when it sentenced Powerstein to 60-months for 26 USC 7201 and 3-months for 26 USC 7212(a). ST of 3/31/94 at 24/16-18. The resulting sentence is

an ANOMALY that is egregious error and in violation of law. What follows is the ANOMALY'S origin:

The BOL of 17 is in large part {94%} a derivative of 7212(a); the 6-SOC's are derivatives of 7212(a); and the 2-level upward departure from 3C1.1 is a derivative of 7212(a). With a 3-month sentence for 7212(a) against an aggregate offense level of 24 and a 60-month sentence for 7201 against an aggregate offense level of one {1}, the result is a sentence that is an ANOMALY that is egregious err by the DC. See DE 250.

{10} Lastly, the DC abused its discretion when it violated 26 USC 7212(a) at sentencing and has perpetuated this error of law by allowing the violation to go undetected, unnoticed and unaddressed for 12 ¾ years. ST of 3/31/94 at 24/19-22. In Koon v. United States, 518 US 81, 116 S Ct 2035, 2047, 135 L Ed 2d 392 (1996) the high court made it perfectly clear that the 11th Cir. acquires jurisdiction in the instant case and here is why:

> "An abuse of discretion standard does not mean a mistake of law is beyond appellate correction. Cooter & Gell, supra at 402, 110 S Ct at 2459. A district court by definition abuses its discretion when it makes an error of law, 496 US at 405, 110 S Ct at 2460." Koon, 116 S Ct at 2047.

Clearly, the DC's violations/errors of law will allow the high court in accord with Koon, supra, to GRANT THIS PETITION FOR EXTRAORDINARY WRIT OF ERROR CORAM NOBIS, 28 USC 1651(a), ALL WRITS ACT {RULE 20}. AND/OR A WRIT OF MANDAMUS/PROHIBITION PURSUANT TO RULE 20(3).

XII. EGREGIOUS VIOLATIONS BY JUDGE SCHLESINGER

12. What follows are 5-egregious violations by the DC that MUST be brought to this court's attention, otherwise these violations will FOREVER go undetected, unnoticed and unaddressed, violations that Schlesinger and AUSA Devereaux have methodically and successfully covered-up which if exposed can and will have grave consequences, and are actions by a DC and AUSA that are a disgrace to our legal system and a manifest injustice.

{A} ANOMALY

At sentencing the DC created an egregious ANOMALY that has through the date of this filing been covered-up by Schlesinger who throughout this convoluted proceeding that

spans 12 ¾ years, that numbers 297 docket entries and 19-11th Cir. appeals has been methodically and carefully covered-up by Schlesinger who DENYS everything put before him and whose orders are 98% of the time without opinion but in the 2% of the time contain cites of cases that Schlesinger has MISREPRESENTED just what the cases stand for. For example, this court is asked to read DE 153 {Appendix E} and DE 156 {Appendix D} and Powersteins' responses in DE 154 and DE 155 to the DC's denials. Bottom line: Schlesinger is mistaken and he has been proven wrong.

See "Reason For Granting This Petition" at XI, paragraph 9, ante for a more thorough discussion of the origin of the Anomaly.

{B} VIOLATION OF 26 USC 7212(a)

At sentencing the DC ordered fines of $50,000 each for 26 USC 7201 and 7212(a). ST of 3/31/94 at 24/19-22. The DC erred with respect to 7212(a) which caps the fine at $5,000.

{C} VIOLATION OF THE EX POST FACTO CLAUSE, ART. 1, SEC. 9, CL. 3

At sentencing the DC used the 1989 edition of the USSG; however the correct USSG is the 1988 EDITION as the indictment and plea agreement indicate the latest date(s) of offense were July 1988 which requires the DC to use the 1988 edition to sentence Powerstein which edition produces a LOWER sentence than use of the 1989 USSG. ST of 3/31/94 at 12/18-23. The DC's sentence is in direct violation of the Ex Post Facto Clause, Art. 1, Sec. 9, Cl. 3. In United States v. Wilson, 993 F2d 213 (11th Cir. 1993) the court held in part:

> "We apply the version of the sentencing guidelines and commentary in effect on date of sentencing, 18 USCA 3553(a)(4)-(5) (1988) unless a more lenient punishment would result under the guidelines version in effect on the date the offense was committed; see United States v. Marin, F2d 1536, 1538 and n. 4 (11th Cir. 1990)."
>
> Wilson, 993 F2d at 216.

Accordingly, the DC was required to use the 1988 USSG and not the 1989 USSG which in fact produced a greater sentence that was in violation of the Ex Post Facto Clause, Art. 1, Sec. 9, Cl. 3 of the Constitution.

{D} VIOLATION OF USSG 2T1.3

At sentencing the DC used estimates and averages to derive a tax loss of $800,000 to less than $1,500,000. ST of 3/31/94 at 8/12-25;

9/1-2. AUSA: "The third one [3d component of $1,100,000] is where it gets very, very fuzzy. And there were estimations, and I can't recall each and every way that the IRS was able to basically skin the cat; but one method for determining the tax loss...was by going on an average, that he would collect x dollars for each taxpayer and then we knew at least 79 taxpayers, we knew the ones from the second component. We knew how much the tax refund was averaging. I mean it's not the same, of course, for each person. And then we just make an average and that would equal the tax loss." ST of 3/31/94 at 8/12-25; 9/1-2.

Such a method VIOLATES 2T1.3 which MANDATES the DC to use the 28% method required by 2T1.3 to derive a tax loss for offense level computations. Use of the 28% method is MANDATORY AND NOT OPTIONAL. It follows that the DC is in direct VIOLATION of 2T1.3.

In United States v. Schmidt, 935 F2d 1440, 1450 (4 Cir 1991) (For purposes of this guideline {2T1.3} the 'tax loss' is 28% of the amount by which the greater of gross income and taxable income was understated.)

In United States v. Barski, 968 F2d 936, 937 (9 Cir 1992) (The tax loss is 28% on the unreported taxable income....$247,052; tax loss at 28% $67,831.)

{E} VIOLATION OF USSG 2T1.4

At sentencing the DC used 2T1.4 to enhance Powerstein 6-levels of SOC's from 26 USC 7206(2), a DISMISSED COUNT AND NOT AN OFFENSE OF CONVICTION. Powerstein had pled to 26 USC 7201 and 7212(a) and neither offense of conviction provides for enhancements as the correct USSG for 7201 is 2T1.1 and for 7212(a) the correct USSG is 2T1.5.

Since 2T1.1 and 2T1.5 measure harm differently, it follows that the harm [loss] cannot be aggregated in accord with USSG 3D1.3(b) as Powersteins' offenses of conviction, 26 USC 7201 and 7212(a) are not "groups of closely related counts" and this is in accord with USSG 1B1.3, background. Accordingly, this court must conclude that enhancements of 6-SOC's from 2T1.4 is egregious err and must be reversed.

In United States v. Hanson, 2 F3d 942 (9 Cir 1993), Hanson was convicted of "...Making false statements in violation of 26 USC 7206(1), and attempting to interfere with the administration of IRS

laws in violation of 26 USC 7212(a)." See id. at 944. On review the 9th Circuit then held:

"We conclude that 2T1.5, fraudulent returns, statements, or other documents, more closely fits Hanson's conduct." Hanson, 2 F3d at 947.

It follows that use of USSG 2T1.4 by the DC at sentencing is clearly erroneous.

XIII. THE DC IS FOREVER BARRED FROM HOLDING POWERSTEIN TO BE SUBJECT TO THE PAINS AND PENALTIES OF CONTEMPT OF COURT

13. Powerstein has demonstrated in 11th Cir. case no. 05-15144-DD that he cannot be held in contempt of court should he continue to file pleadings with the DC, notwithstanding that the government offered 3-frivolous cases in an 8-page Answer Brief in which Powerstein demonstrated in his Reply Brief that he was clearly distinguishable from each of the 3-cases. From the likes of Martin-Trigona v. Shaw, 986 F2d 1384 (11 Cir 1993) in which Anthony Martin-Trigona had filed at least 250-civil suits throughout the United States with the actual number far exceeding the conservative count of 250; to Riccard v. Prudential Insurance Co, 307 F3d 1277 (11 Cir 2002) in which Riccard, labeled a vexatious litigator, filed baseless motions and complaints against his former employer, Prudential Ins. Co, as he had a "vendetta" against Prudential and in which Riccard frivolously argued that Prudential was not a member of NASD at the time Riccard filed his complaint, an argument that proved baseless causing Riccard to file a barrage of motions with various government agencies; to Procup v. Strickland, 792 F2d 1069 (11 Cir 1986), a case in which Procup, serving a life sentence for murder had filed 176 cases in the MDOF, Jacksonville, Florida division alone, not counting suits filed in other federal and state courts, Procup knowing that he had "nothing to lose" by multiple filings as his life sentence can never increase, but could only decrease should he prevail.

In United States v. Woods, 127 F3d 990 (11 Cir 1997) the 11th Cir. addressed the issue of CONTEMPT WITH RESPECT TO DJC, noting that Woods, while still on supervised release from his original crime, committed yet another {2d} crime, that of robbery, which meant that Woods would violate the terms of his supervised release and this scenario would bar Woods from seeking relief under DJC.

In comparing the result in Woods, supra to the instant case, this court must find that Powerstein is clearly distinguishable, namely that any contempt charge that may be levied against Powerstein by the DC would automatically relate-back to Powerstein's ONLY offense to which he pled and this scenario would offer Powerstein DJC relief which finds support in Woods, supra., when the court held:

> "Reasoning that 'criminal contempt, at least in its nonsummary form, is a crime in every fundamental respect.' [United States v. Dixon,] 509 US at 699-700, 113 S Ct at 2858 (internal quotation omitted), the Supreme Court found that a subsequent prosecution for the drug offense was barred by the double jeopardy clause."
> Woods, 127 F3d at 992.

Clearly the 4-cases cited hereinabove are not in the same "league" with Powerstein, who has confined his filings to one {1} United States District Court and of equal importance and contrary to Martin-Trigona, supra, Riccard, supra, and Procup, supra, Powerstein has an illegal sentence and has 20-meritorious issues cited in Reasons For Granting This Petition, Argument VI ante, that will when heard result in the high court REVERSING, VACATING and REMANDING to the DC to start anew.

Simply stated, Powerstein has 20-viable issues that both the DC and 11th Cir. are doing everything in their power to avoid addressing, issues that are founded on sound legal principles and fully supported by case law that will and must result in Schlesinger recognizing and admitting to his VIOLATIONS, ERRORS OF LAW AND ABUSES OF DISCRETION that he has committed and admitted to in DE 161 of 7/30/2002 at 43/19-23 and 44/1-11.

XIV. APPRENDI/BLAKELY/BOOKER LINE OF REASONING

14. Powerstein advised the DC in DE 264 {Appendix O}, DE 267 {Appendix M} and DE 272 {Appendix L} that he fits squarely within the Apprendi {Apprendi v. New Jersey, 530 US 466 (2000)}; Blakely {Blakely v. Washington, 542 US 1493 (2004)}; and Booker/Fanfan, {United States v. Booker/Fanfan, 125 S Ct 738 (2005)} line of reasoning. Then in DE 266 {Appendix N} the DC DENIED Powerstein's Apprendi/Blakely/Booker argument and proceeded to cite as authority in its order,Chavarry v. United States, No. 04-12111 {11th Cir. 1/11/2005} in support of its decision; yet Powerstein pointed out in DE 272 {Appendix L} that the Chavarry decision PRECEDED Booker/Fanfan, thus calling into question

the DC's order of 3/30/2005, DE 266 {Appendix N}, while simultaneously advising the DC that with 11th Cir. docket no. 05-10290-B then pending and in progress with the 11th Cir., that the DC was powerless to issue any order pending completion of 05-10290-B. A DC is stripped of jurisdiction while an appeal to the 11th Cir. is in progress. See Shewchun v. United States, 797 F2d 941, 942 {11 Cir 1986} {Filing of appeal divests trial court of jurisdiction over matters at issue in appeal except to extent that trial court must act in aid of appeal.} {citing United States v. Hitchmon, 602 F2d 689, 692 (5th Cir 1979) (En Banc)}.

The Chavarry decision was handed down on January 11, 2005 and the Booker/Fanfan decision by the United States Supreme Court was issued on January 12, 2005 or 1-day after Chavarry, yet Schlesinger cited Chavarry as authority to deny Powerstein's Apprendi/Blakely/Booker line of reasoning.

Schlesinger must not be allowed to write his own rules, issue orders that are misplaced, threaten Powerstein with the pains and penalties of contempt of court amongst other egregious errors of law so as to prevent our judiciary from reviewing his sentence and conviction order of 3/31/94 which he knows, has admitted to and is in direct violation of all sound legal principles that our legal system is founded on.

Let me remind the high court what Schlesinger admitted to in DE 294, 7/21/2005:

Court: Because you are very articulate, you are very intelligent and what you put down on paper does make good sense.

DE 294, 7/21/2005 at 11/2-4.

Let us contrast the above colloquy what Schlesinger stated in DE 294 to DE 289:

Court: Defendant's seemingly unending and baseless filings only serve to clog the judicial system and deny other cases.

DE 289, 8/30/05 at 2.

Ed. Note: Although DE 294 should be dated after DE 289, it is not because DE 294 is a transcript of the July 21, 2005 hearing in open court.

The contradictions by Schlesinger make a "mockery" of our legal system knowing that on one hand Powerstein is "articulate, intelligent and makes good sense" and on the other hand Powerstein's "baseless filings only serve to clog the judicial system." Either Powerstein knows what he is doing or he files baseless pleadings. Its one or other and Schlesinger simply does not "get it."

XV. ALLEGED TAX LOSS OF $800,000 TO LESS THAN $1,500,000

15. No appeal that I file would be complete unless I address the alleged tax loss of $800,000 to less than $1,500,000 and for good reason as this alleged loss resulted in a BOL of 17 or 68% of the total offense level of 25. In issue XII ante, "Egregious Violations By Judge Schlesinger," paragraph D, I cited AUSA Devereaux's colloquy at sentencing with respect to the tax loss {3d component of $1,100,000} wherein Devereaux states in part, "...it gets very, very fuzzy. And there were estimations and I can't recall...and we just make an average and that would equal the tax loss." ST of 3/31/94 at 8/12-25; 9/1-2.

In the Addendum to the PSR {Appendix K}, I vehemently objected to the tax loss and for good reason. Let us consider the following with respect to the tax loss:

Appendix Q is the DECLARATION OF MITCHELL I. HOROWITZ {"Horowitz"}, my civil attorney for my Tax Court case which reveals that the IRS could not and did not prove the tax loss, nor did it provide Horowitz with the IRS worksheets to substantiate the alleged tax loss of $800,000 to less than $1,500,000.

Declaration: ...I reviewed several of the boxes until about 6:30 PM and came to the conclusion that it would be impossible, based on the records contained in the boxes, to even come close to approximating a tax loss. I asked Mr. Noisette {IRS special agent} if the team had prepared any workpapers or other documents establishing a basis for this computation, and was advised that there were no such records available... As a result, on information and belief, no information or documentation was submitted at the sentencing hearing to support the "tax loss" computation. To the date of this declaration, I have not been provided with any of the supporting documentation requested in my letter to Mr. Noisette dated November 3, 1993 by which the IRS determined the amount of the alleged tax loss. Declaration of Mitchell I. Horowitz at pages 4-5 {Appendix Q}

Schlesinger simply ignored my objections to the alleged tax loss as he was "dead set" on sentencing me to 63-months and did not care how he got there. The same is true for AUSA Devereaux. This court must and will "see through" what has occurred in this travesty.

XVI. PROFFER

16. No appeal can be complete unless I address my PROFFER and for good reason. Attached as Appendix R is the PROFFER I signed on 1/11/1990, yet on 3/17/1993 I was indicted which was handed down 33-months after my executed PROFFER that was filed with the United States Attorney's office, DOJ and IRS.

Despite the PROFFER, Schlesinger departed upward for Obstruction of Justice, 3C1.1 {2-levels} and denied me Acceptance of Responsibility, 3E1.1, when he ignored the PROFFER as if it did not exist. {In DE 161 of 7/30/02, Schlesinger would admit his error as to 3E1.1}. To ignore a PROFFER is a GROSS ABUSE OF DISCRETION by a trial judge who was "dead set" on a sentence of 63-months no matter how he would get there, and this is a manifest injustice.

XVII. SIX {6} LEVEL ENHANCEMENT FROM USSG 2T1.4

17. No appeal can be complete unless I address the ILLEGAL six {6} level enhancement from 2T1.4 at sentencing on 3/31/1994. In issue XII, ante, "Egregious Violations By Judge Schlesinger," paragraph E, I argued that since the DC used 2T1.4 to enhance me 6-levels of SOC's from 26 USC 7206(2), a DISMISSED COUNT AND NOT AN OFFENSE OF CONVICTION, the enhancement is ILLEGAL as I pled to 26 USC 7201 and 7212(a) {and not to 7206(2)} and neither of my offenses of conviction provide for enhancements as the correct USSG for 7201 is 2T1.1 and for 7212(a) it is 2T1.5. That 2T1.1 and 2T1.5 measure harm differently. It follows that the harm (loss) cannot be aggregated in accord with USSG 3D1.3(b) as my offenses of conviction, 26 USC 7201 and 7212(a) are not "groups of closely related counts" and this is in accord with USSG 1B1.3, Background.

Further, dismissed counts that are NOT offenses of conviction CANNOT be used to support upward departures, e.g., 6-SOC's from 2T1.4. There is an abundance of case law to support my views on this issue. See United States v. Ashburn, supra; United States v. Castro-Cervantes, supra; United States v. Faulkner, supra; and United States v. Ruffin, supra.

Ed. Note: This Petition For A Writ of Mandamus/Prohibition {Rule 20 $^{(3)}$} has come to an end, but not because I have run out of arguments, but rather I have run out of pages as I cannot exceed 30-pages. If I have not convinced the Supreme Court of the United States to GRANT this writ, then I never will. I rest my case and can only pray this court will see to it that justice prevails in the end.

Otherwise, Schlesinger and AUSA Devereaux will have accomplished what they have set out to do after my indictment, which was to put me away for a long time, no matter what it would take and even if they have to cover-up their VIOLATIONS, ERRORS OF LAW AND/OR ABUSES OF DISCRETION by methodically and systematically denying each and every pleading I filed and 98% of the time without opinion. Once AUSA Devereaux read my INITIAL BRIEF in my initial appeal to the 11th Cir. {docket no. 94-2491} he embarked on a course to see to it that my issues would never be ruled upon by the DC. Thus when my court-appointed attorney, Michael Alan Ceballos REFUSED to file my REPLY BRIEF in 94-2491, along comes United States v. Buchanan, supra, which AUSA Devereaux "jumped on" to ask the 11th Cir. to dismiss my appeal as I had pled out and the 11th Cir. "obliged." In sum, the 11th Cir. said in Buchanan, that where one pleas out, then dismiss the appeal, "sooner than later." The record reveals that I would go on to file 18-additional meritorious appeals, hold 2-in court hearings, allow my DC docket to number 297 entries only to find that the DC would threaten me with the pains and penalties of contempt of court. What a travesty to say the least. It is critical for the high court to fully understand why I had to file 18-additional appeals in the next 12 ¾ years, none of which were frivolous. Other than 11th Cir. dockets 94-2491 {initial appeal} and 99-13170-D {VACATED AND REMANDED}, all other appeals were filed to either force the DC to comply with 11th Cir. mandates as in 01-17101-C or to appeal the DC's denials without opinions to pleadings I filed seeking relief from an ILLEGAL CONVICTION AND SENTENCE. However, rather than pay the filing fees for each appeal, I filed the appeal with a caveat that the 11th Cir. require both parties file JURISDICTIONAL BRIEFS to settle this issue prior to payment of fees. I felt that ECONOMIES OF SCALE dictated that jurisdiction be noted prior to payment of court filing fees. In this regard, the high court is asked to review 11th Cir. 01-17101-C in which the government challenged jurisdiction after I had filed my INITIAL BRIEF/ RECORD EXCERPTS with the 11th Cir and paid the filing fee.

AUSA Devereaux summed up the travesty as follows:

"As far as tax cases, really as many white-collar crimes go, Mr. Powerstein is looking at over five years in prison, which is a substantial amount of time generally in relation to other tax cases that come before the court." ST of 3/31/1994 at 20/20-23.

Further affiant sayeth naught. **END**

CONCLUSION

The Petition For A Writ of Mandamus/Prohibition {Rule 20 (3)} should be GRANTED.

Respectfully submitted,

Date: November 8, 2006

Allen Powerstein, pro se

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-15144

District Court Docket No.
93-00006-CR-OC-20-HTS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ALLEN D. POWERSTEIN,
Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: June 19, 2006
For the Court: Thomas K. Kahn, Clerk
By: Jackson, Jarvis

ISSUED AS MANDATE
Aug 14, 2006
U.S. Court of Appeals
Atlanta, GA.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
Jun 19, 2006
THOMAS K. KAHN
CLERK

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-15144

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ALLEN D. POWERSTEIN,
Defendant-Appellant.

On Appeal from the United States District Court for the
Middle District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before: TJOFLAT, ANDERSON and BIRCH, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Tjoflat
GERALD TJOFLAT
UNITED STATES CIRCUIT JUDGE

Filed Aug 04 2006
U.S. Court Of Appeals Eleventh Circuit
Thomas K. Kahn Clerk

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-15144
Non-Argument Calendar

D.C. Docket No. 93-00006-CR-OC-20-HTS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ALLEN D. POWERSTEIN,
Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(June 19, 2006)

Before TJOFLAT, ANDERSON and BIRCH, Circuit Judges.

PER CURIAM:

In 1993, a federal grand jury indicted appellant on thirteen counts involving the crimes of tax fraud and tax evasion. Pursuant to a plea agreement in which he waived his right to appeal any sentence imposed within the sentence range prescribed by the Sentencing Guidelines, appellant pled guilty to counts one and eleven of the indictment, and in March 1994, the district court sentenced him to concurrent prison terms of sixty-three months, to be followed by a three-year term of

supervised release. Appellant appealed his sentences. We dismissed his appeal in May 1998, on the ground that he had waived his right to challenge his sentences. United States v. Powerstein, No. 94-2491 (11th Cir. 1998) (unpublished).

In an effort to have his plea agreement and sentences set aside, appellant returned to the district court, filing a series of motions. The district court denied his motions, the final ruling occurring on January 19, 1999. In the order entered that day, the court denied appellant's December 28, 1998 motion on the ground that it constituted a successive motion for 42 U.S.C. § 2255 relief. Appellant appealed that ruling. On June 20, 2000, concluding that appellant's December 28 motion was not a successive § 2255 motion, we vacated the court's January 19 order and remanded the case for further proceedings. Powerstein v. United States, No. 99-13170 (11th Cir. 2000) (unpublished).

While the appeal in No. 99-13170 was pending, appellant, continuing his effort to litigate the sentencing issues he had waived in the plea agreement, filed a variety of motions in the district court, including a renewed motion for writ of error coram nobis. In August 1999, after the court had denied some of these motions, appellant appealed the rulings. No. 99-13315. We dismissed the appeal for want of prosecution on December 14, 1999.

Meanwhile, in October 1999, the district court denied appellant's renewed motion for a writ of error coram nobis; in December 1999, the court denied his motion for reconsideration of that ruling. Appellant appealed, No. 00-10432. In September 2001, we affirmed.

Appellant was released from prison and completed his term of supervised release in November 2001. Thereafter, he resumed his effort to obtain collateral relief in the district court and in this court.[1] On July 21, 2005, the district court held a hearing in which it reviewed the history of appellant's case. The court told

---

[1]Appellant filed a total of 61 documents seeking collateral relief.

appellant that he had exhausted every claim that might have merit and that it intended to enter an order barring him from filing additional pleadings attacking his convictions and sentences. The court gave appellant thirty days to brief his objections to the proposed ban. Appellant filed a brief challenging the court's authority to enter the proposed order. After the Government responded, and appellant filed an omnibus motion in opposition, the court entered an order barring appellant "from filing any other pleading or documents of any kind in this case, subject to the pains and penalties of contempt of court, unless this Court is ordered by the Eleventh Circuit ... or the Supreme Court ... to accept the filing." Appellant appeals that order.

Appellant contends that the district court: (1) abused its discretion in entering the order; (2) lacked authority to enter the order; and (3) violated his constitutional rights regarding double jeopardy by entering the order because, if he violates it and is found in contempt, he will be punished once again for conduct for which he has already served a prison term.

We review a district court's grant of injunctive relief for abuse of discretion and will affirm unless the district court made a clear error of judgment. SunAmerica Corp. v. Sun Life Assurance co. of Canada, 77 F.3d 1325, 1333 (11th Cir. 1996). We review questions of constitutional law de novo. United States v. Noel, 231 F.3d 833, 836 (11th Cir. 2000).

Procedural due process requires notice and an opportunity to be heard before any governmental deprivation of a property or liberty interest. Zipperer v. City of Fort Myers, 41 F.3d 619, 623 (11th Cir. 1995). Meaningful access to the courts is a right of constitutional significance. See Christopher v. Harbury, 536 U.S. 403, 415 & n.12, 122 S.Ct. 2179, 2187 & n.12, 153 L.Ed.2d 413 (2002). Thus, appellant was entitled to notice and an opportunity to be heard before the court imposed the injunctive order complained of.

APPENDIX A

Courts, however, have the jurisdiction to protect themselves against abusive litigants. Procup v. Strickland, 792 F.2d 1069, 1073 (11th Cir. 1986) (en banc). "Federal courts have both the inherent power and the constitutional obligation to protect their jurisdiction from conduct which impairs their ability to carry out Article III functions ... The court has a responsibility to prevent single litigants from unnecessarily encroaching on the judicial machinery needed by others." Id. at 1073-74 (citation omitted). A litigant "can be severely restricted as to what he may file and how he must behave in his applications for judicial relief. He just cannot be completely foreclosed from any access to the court." Id. at 1074.

The district court did not abuse its discretion in entering the injunctive order before us. First, to satisfy due process requirements, the court provided appellant with adequate notice and an opportunity to respond. Second, the court did not place appellant at risk of double jeopardy since any future incarceration would serve as a contempt sanction, not for the crimes alleged in counts one and eleven of the 1993 indictment against appellant. See United States v. Woods, 127 F.3d 990, 992 (11th Cir. 1997) ("a prosecution and conviction for criminal contempt is punishment for the conduct constituting contempt of court, not for any underlying crime"). Further, the injunction's requirements are within the scope of authority given to district courts. This injunction does not cut off access to the courts; appellant has the right to file pleadings in other cases, and may also file additional pleadings in this case if he permitted by this court or the Supreme Court. Given that he completed his sentences almost five years ago, and has filed more than forty pleadings and fifteen appeals since then, he has already had the opportunity fully to litigate the validity of his convictions and sentences. Finally, as he is no longer being punished for the crimes to which he was adjudged guilty, the claims he raises are moot for there is nothing a court could do to provide relief.

APPENDIX A

The challenged district court order is, accordingly, AFFIRMED.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUNE 19, 2006
THOMAS K. KAHN
CLERK

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

UNITED STATES OF AMERICA

v.

ALLEN D. POWERSTEIN

ORDER

On July 22, 2005 this Court entered an Order requiring Defendant Powerstein to show cause why the Court should not enter an Order barring Defendant from filing any other pleadings or documents of any kind in this Court, subject to the pains and penalties of contempt of court, unless this Court is ordered by the Eleventh Circuit Court of Appeal or the Supreme Court of the United States to accept the filing. (Doc. No. 283). On August 15, 2005, Defendant responded to this Court's Order, primarily arguing that the Court does not have the authority to enter such an Order. (Doc. No. 285). The United States responded in opposition to Defendant's arguments. (Doc. No. 287, filed August 22, 2005). Defendant has also filed a Motion to Traverse the United States' response (Doc. No. 286, filed August 16, 2005), which is DENIED.

For more than a decade, this case has endured a tortured history. Defendant entered a plea agreement on July 2, 1993 (Doc. No. 56) and Judgment was entered against him on March 31, 1994. (Doc. No. 68). The Court of Appeals for the Eleventh Circuit dismissed Defendant's appeal on May 12, 1998. (Doc. No. 92). This Court denied Defendant's first motion to vacate his sentence pursuant to 28 U.S.C. 2255 on July 15, 1998 (Doc. No. 94) and denied Defendant's successive habeas petition on January 12, 1999. In the more than six years since that time, Defendant has incessantly filed hundreds of documents. In fact, nearly two-hundred docket entries have been recorded since the Court's denial of Defendant's second § 2255 petition in 1999. Although Defendant has served his complete sentence of incarceration as well as his term of supervised release, and is

currently living with no restraints on his freedom, he continues to flood this court with requests to alter his non-existent sentence.

The Court has made crystal clear that it does not have the authority to provide Defendant with the relief he seeks. It is unnecessary for Defendant to continue to file a multitude of motions requesting the same relief. Therefore, Defendant is hereby notified and forewarned that he is **barred from filing any other pleadings or documents of any kind in this case, subject to the pains and penalties of contempt of court, unless this Court is ordered by the Eleventh Circuit Court of Appeal or the Supreme Court of the United States to accept the filing.** Defendant's seemingly unending and baseless filings only serve to clog the judicial system and delay other cases. Defendant should recognize that this Court gives each motion filed in any case a thorough and expeditious review. However, this Court does not have unlimited resources, and Defendant's motions continue to ask for the same relief which has been previously denied and which this court does not have authority to grant. In addition, to the extent Defendant's most recent filing, entitled his "Omnibus Motion" (Doc. No. 288, filed August 29, 2005) seeks additional action by this Court, it is likewise DENIED.

DONE AND ENTERED at Jacksonville, Florida, this 30 day of August, 2005.

/s/ Harvey E. Schlesinger
HARVEY E. SCHLESINGER
United States District Judge

Copies to:
Allen D. Powerstein, Pro Se
Mark Devereaux, AUSA

Filed 2005 August 30 P 4:15
CLERK, US DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

APPENDIX B

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE ALLEN POWERSTEIN - PETITIONER
VS.
UNITED STATES OF AMERICA – RESPONDENT

PROOF OF SERVICE

I, ALLEN POWERSTEIN, do swear or declare that on this date, November 8, 2006, as required by Supreme Court Rule 29 I have served the enclosed PETITION FOR A WRIT OF MANDAMUS/PROHIBITION {RULE 20 (3) } on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.
The names and addresses of those served are as follows:

(1) Solicitor General of the United States
Department of Justice
950 Pennsylvania Avenue, N.W., Room 5614
Washington, DC 20530-0001

(2)Harvey E. Schlesinger, J.,
United States District Court
United States Courthouse
Middle District Of Florida
300 North Hogan Street
Jacksonville, Fl 32201

I declare under penalty of perjury that the foregoing is true and correct.
Executed on November 8, 2006

Allen Powerstein, pro se